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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**

13 SECURITIES AND EXCHANGE
COMMISSION,

14 Plaintiff,

15 vs.

16 PETER L. JENSEN and THOMAS C.
17 TEKULVE, JR.,

18 Defendants.
19

Case No. CV 11-05316 R (AGRx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
MOTION FOR SUMMARY
JUDGMENT AGAINST
DEFENDANT THOMAS C.
TEKULVE, JR., AND FOR
PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANT PETER L.
JENSEN**

20 Date: August 20, 2012
Time: 10:00 a.m.
21 Place: Courtroom 8
(Honorable Manuel L. Real)
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1 **I. INTRODUCTION**

2 The uncontroverted facts establish that both Defendants in this action violated
3 the federal securities laws by dramatically and repeatedly inflating the reported
4 revenues of Basin Water, Inc. (“Basin”). The Defendants – Basin’s CEO and CFO –
5 began their fraudulent scheme the very first quarter Basin became a public company
6 and continued their scheme for two years. During that two year period, Defendant
7 Peter L. Jensen (“Jensen”), Basin’s CEO, realized over \$9 million by selling his
8 shares of Basin stock, and further profited by donating shares of Basin stock to his
9 *alma mater*, MIT, and taking \$763,345 in tax deductions for those donations.

10 Plaintiff Securities and Exchange Commission (“Commission”) moves for
11 summary judgment against both Defendant Jensen and Defendant Thomas C.
12 Tekulve, Jr. (“Tekulve”) with regard to their financial fraud and related violations.
13 Additionally, the Commission moves for partial summary judgment against Jensen
14 for his insider trading in 2006 and 2007.¹ The Commission’s motion is based upon
15 the uncontroverted facts establishing that the Defendants caused Basin to fraudulently
16 recognize and report inflated revenues in seven of the eight quarters during the years
17 2006 and 2007. The uncontroverted facts further establish that when Jensen sold his
18 Basin stock in 2006 and 2007, he was aware of the material nonpublic information
19 that the company’s reported revenues (and hence its stock price) were inflated.

20 The accompanying Statement Of Uncontroverted Facts (“Facts”) sets forth a
21 litany of fraudulent acts by the Defendants that occurred in seven of the eight
22 quarters of 2006 and 2007. The Facts set forth, chronologically, the following

23 _____
24 ¹ If summary judgment is granted, the sole remaining issue will be whether
25 Jensen’s trades in 2008, after he left his position as Chairman of the Board and
26 became a consultant, constituted insider trading entitling the Commission to
27 additional penalty relief. Even absent a fraud finding with regard to these trades,
28 however, Jensen’s profits realized from these trades are subject to reimbursement
under Section 304 of the Sarbanes-Oxley Act of 2002 (“SOX”), because they were
made within twelve months of Jensen’s certification of Basin’s third quarter 2007
Form 10-Q filed with the Commission. The Commission does seek such
reimbursement by summary judgment. Accordingly, the only relief the Commission
is not seeking by this motion is an insider trading penalty on Jensen’s 2008 trades.

1 repeated pattern of fraudulent conduct in each quarter:

2 • A few days before the end of the quarter, but more often after quarter-
3 end but before filing of the Form 10-Q or 10-K, the Defendants negotiated and/or
4 documented a purported sale which they knew did not meet the standards under
5 Generally Accepted Accounting Principles (“GAAP”) for revenue recognition.² In
6 most cases, the transactions had no economic substance whatsoever, and were out-
7 and-out shams. Additionally, most of these purported sales were supported by
8 backdated documents created by Tekulve and in the case of the first quarter, signed
9 by Jensen after quarter end.

10 • In order to increase reported revenues, the Defendants recognized
11 material amounts of revenue based on the dubious or sham transaction.

12 • The Defendants then lied to the auditors, signing a quarterly
13 management representation letter falsely representing that all transactions were
14 properly recorded under GAAP and the Defendants were not aware of any fraud.
15 Additionally, in three cases, Tekulve prepared or supervised the preparation of
16 memoranda to the auditors addressing specific transactions which Tekulve
17 represented to the auditors were properly recorded when he knew they were not.

18 • Tekulve prepared or supervised preparation of the materially false
19 filing, which he and Jensen reviewed, signed and certified, falsely representing to
20 the public the inflated system sales, and resulting inflated revenues and gross
21 profits resulting from their fraud.

22 • Tekulve prepared the false quarterly earnings release, also filed with
23 the Commission, which contained the falsely inflated revenue figures, and Jensen
24 reviewed and approved any quotation attributed to him in the release, including
25 those falsely representing Basin’s financial condition.

26
27 ² GAAP are the conventions, rules and procedures that constitute the
28 professional standards of the accounting profession. *United States v. Arthur Young
& Co.*, 465 U.S. 805, 811 n.7 (1984).

1 ● The Defendants participated in a quarterly conference call with
2 analysts, in which one or both of them read from a script presenting the false
3 financial results, which script was substantially prepared by Tekulve, and which
4 Jensen reviewed at least to the extent he was to make the scripted remarks. In
5 many instances, they further embellished their fraudulent representations by
6 making additional false representations in response to questions by analysts.

7 ● Jensen sold stock, profiting by millions of dollars, when the stock
8 reached various target prices, which prices were reached as a result of the false
9 picture he had presented to the public regarding Basin's financial situation.

10 These acts violated the antifraud, books and records and certification
11 provisions of the federal securities laws. Tekulve also lied to company auditors.
12 The Defendants are also liable either as control persons or aiders and abettors of
13 Basin for violating the company issuer reporting requirements. Finally, by engaging
14 in insider trading, Jensen further violated the antifraud provisions.

15 The undisputed Facts are established by the Defendants' own admissions, by
16 the annual and quarterly reports signed and certified by the Defendants, by the
17 Defendants' recorded and transcribed misrepresentations during earnings
18 conference calls with analysts, and by documents the Defendants indisputably
19 participated in creating and/or signing and presenting to the auditors or the public.
20 The Defendants' fraudulent acts were repeated, egregious, and intentional. Jensen
21 also profited from his fraud by insider trading, receiving over \$9 million.

22 The Commission accordingly seeks by this motion entry of a final judgment
23 against each Defendant permanently enjoining him from future violations of the
24 above statutory and regulatory provisions; ordering each to disgorge his ill-gotten
25 gains, consisting of salary and bonuses and, in the case of Jensen, insider trading
26 profits and tax deductions; ordering each to pay a civil penalty of \$260,000; and
27 permanently barring each from acting as an officer or director of a public company.
28 Additionally, the Commission seeks reimbursement from each Defendant pursuant

1 to SOX Section 304 of his bonuses and incentive based compensation and, in the
2 case of Jensen, the over \$9 million he received from his sales of Basin stock.
3 Finally, the Commission seeks triple penalties from Jensen for his insider trading in
4 2006 and 2007, by which he profited by almost \$3 million.

5 **II. ARGUMENT**

6 Summary judgment is appropriate when the pleadings, affidavits, and other
7 supporting papers permitted by Rule 56 of the Federal Rules of Civil Procedure
8 demonstrate that there is no genuine issue of material fact, and the moving party is
9 entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,
10 477 U.S. 317, 322 (1986). As set forth below, the undisputed facts, established
11 primarily by the Defendants' own admissions supported by documentary evidence,
12 demonstrate that they violated the antifraud and other provisions of the federal
13 securities laws and that the Commission is entitled to the relief it seeks.

14 **A. The Defendants Violated Multiple Federal Securities Laws**

15 **1. The Defendants Violated The Antifraud Provisions**

16 Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b)
17 of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder
18 prohibit fraud. Rule 10b-5, which is worded similarly to Section 17(a) provides that:

19 It shall be unlawful for any person, directly or indirectly, by the use of
20 any means or instrumentality of interstate commerce, or of the mails,
21 or of any facility of any national securities exchange,

22 (a) to employ any device, scheme or artifice to defraud,

23 (b) to make any untrue statement of a material fact or to omit to
24 state a material fact necessary in order to make the statements
25 made, in the light of the circumstances under which they were
26 made, not misleading; or

27 (c) to engage in any act, practice, or course of business which
28 operates or would operate as a fraud or deceit upon any person,

1 in connection with the purchase or sale of any security.

2 The Defendants violated the antifraud provisions of Section 10(b), 15 U.S.C.
3 § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, by making (1)
4 material misrepresentations, (2) in connection with the purchase or sale of a
5 security, (3) with scienter, (4) by use of the jurisdictional means. *See SEC v. Rana*
6 *Research, Inc.*, 8 F.3d 1358, 1364 (9th Cir. 1993). Section 17(a) requires
7 essentially the same proof, except that the Commission is not required to prove
8 scienter, but merely negligence, to establish violations of Section 17(a)(2),
9 prohibiting misrepresentations and omissions of material fact, or 17(a)(3),
10 prohibiting conduct which operates or would operate as a fraud or deceit. *See SEC*
11 *v. Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001).

12 As set forth in more detail below, the facts establish that key elements of a
13 fraud violation: (1) that Defendants' acts constituted (a) devices, schemes or
14 artifices to defraud, (b) material misrepresentations and omissions, and/or (c) a
15 course of business that operated as a fraud upon Basin investors and potential
16 investors; and (2) that the Defendants acted with scienter.

17 Finally, these Defendants are liable for certain of their Exchange Act violations, not
18 just because the Commission has presented uncontroverted facts establishing that they
19 directly violated the antifraud provisions, but because they were control persons of Basin.

20 **a) The Defendants Were Control Persons Of Basin**

21 Under Exchange Act Section 20(a), 15 U.S.C. § 78t(a), a defendant may be
22 held liable for securities violations if: (1) there is a violation of the Exchange Act;
23 and (2) the defendant directly or indirectly controls any person liable for the
24 violation. *SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011). "Control" is "the
25 possession, direct or indirect, of the power to direct or cause the direction of the
26 management and policies of a person, whether through ownership of voting
27 securities, by contract or otherwise." *Id.* at n.4, *quoting* 17 C.F.R. § 230.405. The
28 definition of the "person" who may be deemed "controlled" under Section 20(a)

1 includes a company. *SEC v. Todd*, 642 F.3d at 1223.

2 Indicia of control include whether the person managed the company on a
3 day-to-day basis and was involved in the formulation of financial statements,
4 which is sufficient to “presume control over the ‘transactions giving rise to the
5 alleged securities violation.’” *SEC v. Todd*, 642 F.3d at 1223. [citation omitted.]
6 Actual authority over the preparation and presentation of the financial statements is
7 sufficient to demonstrate control. *Id.*

8 The Defendants’ control over Basin during the relevant period is
9 indisputable. As Jensen asserts, during the period he was CEO, until February
10 2008, only he and Tekulve were running the company. (Facts ¶ 6.) They
11 accordingly managed the company on a day-to-day basis.

12 Moreover, Jensen admits he saw himself as “kind of the deal guy,” and “kind
13 of a leader” who would “see opportunities,” and negotiate deals. (Facts ¶ 4.) These
14 deals included the first two fraudulent deals with Opus Trust and Thermax, described
15 below. Jensen also signed and certified the relevant Forms 10-Q and the 2006 Form
16 10-K, knowing that they included these revenues, as well as subsequent 2007 filings.
17 (Facts ¶¶ 59-61, 63, 73-75, 99-101, 113-15, 132-39, 144-49.) Additionally, in
18 management representation letters provided to the auditors, Jensen and Tekulve both
19 confirmed that they were “responsible for the fair presentation” of the financial
20 information “in conformity with” GAAP.” (Facts ¶¶ 48, 68, 96, 106.)

21 Tekulve was also a control person of Basin. He admits he had responsibility
22 for the Basin’s financial structure and organization; indeed, Tekulve created the
23 financial organization within Basin. (Facts ¶ 10.) Among other things, with
24 Jensen’s knowing consent, Tekulve hired as his Director of Finance Douglas
25 Hansen (“Hansen”), an individual who had previously been enjoined in a
26 Commission fraud action and who had been barred from appearing and practicing
27 as an accountant before the Commission. (Facts ¶¶ 10-13.) Tekulve and Hansen
28 also recommended hiring Singer Lewak Greenbaum & Goldstein (“SingerLewak”)

1 as Basin's auditor. (Facts ¶ 11.) Tekulve was responsible for establishing a
2 system of internal controls for the company. (Facts ¶ 14.) Tekulve further
3 understood he was ultimately responsible for the accuracy of Basin's financial
4 statements as well as its Management Discussion and Analysis ("MD&A") section
5 of the quarterly Forms 10-Q and annual Forms 10-K filed with the Commission.
6 (Facts ¶ 15.) Tekulve always fully reviewed the Forms before they were filed.
7 (Facts ¶ 15.) He too signed and certified the Forms, including the 2007 Form 10-
8 K. (Facts ¶¶ 59-62, 73, 75, 99-101, 113-15, 132-34, 144-48, 162-64.)

9 These facts are more than sufficient to establish that Jensen and Tekulve had actual
10 authority over the preparation and presentation to the public of the financial statements.
11 This is sufficient to demonstrate their control. *SEC v. Todd*, 642 F.3d at 1223.³

12 **b) The Defendants' Fraudulent Acts And Representations**

13 Violations of the antifraud provisions require that misstatements and
14 omissions made by the defendant concern material facts. *Basic Inc. v. Levinson*,
15 485 U.S. 224, 231-32 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438,
16 449 (1976). *See also SEC v. Dain Rauscher, Inc.* 254 F.3d at 856. A fact is
17 material if there is a substantial likelihood that a reasonable investor would
18 consider it important in making an investment decision. *Id.* Liability arises not
19 only from affirmative representations but also from failures to disclose material
20 information. *SEC v. Dain Rauscher*, 254 F.3d at 855-56. The antifraud provisions
21 impose "a duty to disclose material facts that are necessary to make disclosed
22 statements, whether mandatory or volunteered, not misleading." *SEC v. Fehn*, 97
23

24 ³ These defendants cannot establish they acted in "good faith," which they must
25 do to defeat summary judgment as to their control person liability. To establish such
26 a "good faith" defense, the Defendants must establish that they (1) did not act
27 recklessly and (2) did not induce the violations. The evidence, discussed below, that
28 the Defendants acted at least recklessly, precludes their ability to rely on the good
faith defense to defeat summary judgment. *SEC v. Todd*, 642 F.3d at 1224.
Additionally, because the Defendants both engaged in dissemination of false
information to the public, through the false filings, the earnings press releases and the
analyst conference calls, they cannot establish that they did not induce the fraud. *Id.*

1 F.3d 1276, 1290 n.12 (9th Cir. 1996).

2 Here, the Defendants unquestionably made misrepresentations of material fact.
3 Information relating to a company's financial condition is material. *SEC v. Todd*,
4 642 F.3d 1207; *see also* Facts ¶ 48 (Tekulve admits that "almost everything was
5 material. We were such a small company."). Moreover, how officers and directors
6 of a public corporation describe revenue growth to investors is important. *Id.* By the
7 very nature of the information, financial reports are relevant to investment decisions.
8 *See SEC v. Caserta*, 75 F. Supp. 2d 79, 92-93 (E.D.N.Y. 1999); *see also SEC v.*
9 *Solucorp Ind. Ltd.*, 274 F. Supp. 2d 379, 419 (S.D.N.Y. 2003).

10 In this case, the Defendants caused the recognition of revenue from several
11 purported sales, which accounted for material amounts of Basin's revenues in each
12 of the relevant quarters and years. The amounts recognized were significantly above
13 the 5% quantitative threshold for assuming on a preliminary basis that a misstated
14 amount is material. *See United States v. Nacchio*, 519 F.3d 1140, 1162-63 (10th
15 Cir. 2008) (concluding 4.2% revenue shortfall is not immaterial as a matter of law),
16 *citing Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 162-64 (2d Cir. 2000) (holding
17 on the basis of Staff Accounting Bulletin No. 99 ("SAB 99") that "numerical
18 benchmark[s]" are informative but not the "exclusive" test of materiality).

19 These overstatements of revenue were material because they misrepresented
20 and concealed Basin's true (poor) financial performance. As explained in more
21 detail below, however, the Defendants' actions in furtherance of the fraudulent
22 scheme went well beyond simply causing the material overstatement in revenue to
23 be falsely reported. Rather, Jensen negotiated two of the key deals, with Opus
24 Trust and Thermax, and signed the Opus Trust agreement well after quarter-end;
25 Tekulve drafted key documents falsely depicting the transactions and ignored
26 relevant GAAP provisions. Both lied to company auditors including in
27 management representation letters and, in the case of Tekulve, in various
28 memoranda describing certain transactions. Tekulve also wrote the financial

1 portions of the false Forms 10-Q and Forms 10-K filed with the Commission, and
2 scripted and participated in quarterly analyst conference calls where
3 misrepresentations regarding company financial performance were repeated.

4 The Commission's regulations require that interim financial statements be
5 prepared in accordance with GAAP, and failure to do so makes the financial
6 statements presumptively misleading. *SEC v. Caserta*, 75 F. Supp. 2d at 90, *citing*
7 Regulation S-X, 17 C.F.R. §§ 210.1-02(a)(2), 249.308a. In 2009, Basin restated
8 the financial statements for the relevant periods, reversing recognition of revenue
9 on each of the transactions at issue in this case. (Facts ¶¶ 171-173.) Such a
10 restatement may be an admission sufficient to show that material misstatements
11 were made in a company's financial statements. *See In re Peritus Software*
12 *Services, Inc.*, 52 F. Supp. 2d 211, 213 (D. Mass. 1999). Moreover, violations of
13 GAAP provisions may indicate that the antifraud provisions have been violated.
14 *See Freedman v. Louisiana Pacific Corp.*, 922 F. Supp. 377, 391 (D. Or. 1996);
15 *SEC v. Caserta*, 75 F. Supp. 2d at 90 (a statement made in violation of GAAP may
16 be found to be misleading under the federal securities laws; by their very nature,
17 financial reports are relevant to investment decisions); *Marksman Partners, L.P. v.*
18 *Chantal Pharmaceutical Corp.*, 927 F. Supp. 1297, 1305 (C.D. Cal. 1996).

19 Here, the Defendants violated very basic GAAP concerning revenue recognition
20 with which Tekulve, who had been licensed as a CPA, was quite familiar. (*See* Facts ¶
21 20.) Jensen, an experienced CEO of public companies, also understood there were
22 GAAP requirements for recognizing revenue, and knew at least some of those
23 requirements which were relevant to the transactions at issue. (*See* Facts ¶¶ 2 & 21.)

24 The relevant GAAP provision is Staff Accounting Bulletin ("SAB") 104,
25 which sets forth the four elements required to recognize revenue:

- 26 1. Persuasive evidence of an arrangement between the parties;
- 27 2. Delivery has occurred or services have been rendered;
- 28 3. The seller's price to the buyers is fixed and determinable; and

1 4. Reasonable assurance of collectability.
2 (Facts ¶ 20.) Tekulve correctly understood these were the “four major prongs” of
3 SAB 104 (*Id.*) Jensen also understood that there were requirements for
4 recognizing revenue, including that an order is not valid if it is contingent, and that
5 collectability was relevant to recognizing revenue. (Facts ¶ 21.)

6 As described below, neither elements (1) nor (4) were present with respect to any
7 of the transactions for which the Commission contends revenue should not have been
8 recognized. Additionally, delivery did not occur with respect to most of the transactions.

9 **(1) The Purported Q1 2006 Sale To Opus Trust**

10 The Defendants commenced their fraudulent scheme the very first quarter of
11 Basin’s existence as a public company. Basin was to receive \$1.5 million from an
12 offshore entity based in Nevis, Opus Trust, in exchange for two Basin systems.
13 Neither Jensen nor Tekulve ever investigated whether the offshore entity could pay
14 \$1.5 million, or even learned who comprised the entity. (Facts ¶¶ 28-29.)
15 Moreover, not only was there no reasonable assurance of collectability, but there
16 was no evidence of an arrangement, as the deal materially changed after the first
17 quarter, in which the \$1.5 million in revenue was recognized. (Facts ¶¶ 33 & 40.)
18 Most significantly, a liquidated damages clause, limiting Opus Trust’s liability to
19 Basin to the amount already paid – \$150,000 – was inserted into the final
20 agreement, signed after March 31, 2006. (Facts ¶¶ 39-40.)

21 Clearly, there was no evidence of an arrangement between the parties as of
22 March 31, 2006, when revenue was recognized. The presence of the liquidated
23 damages clause in the Agreement also meant that the price was not fixed and
24 determinable as of March 31, 2006. Additionally, there was no reasonable
25 assurance that the remaining \$1.35 million in recognized revenue was collectable
26 for two obvious reasons. First, the liquidated damages clause precluded Basin
27 from collecting this revenue. Second, even absent the liquidated damages clause,
28 neither Defendant investigated the financial wherewithal of Opus Trust to pay the

1 substantial remaining sum, notwithstanding that both knew a reasonable assurance
2 of collectability was required for recognition of revenue. (*See* Facts ¶¶ 20-21.)

3 The \$1.5 million constituted over 40% of Basin's first quarter revenue – an
4 amount that Tekulve admits was material. (Facts ¶¶ 42 & 45.) The Defendants did
5 not correct this material overstatement of revenue, which was included in Basin's
6 year-to-date revenues reported in Q2 2006.

7 **(2) The Purported Q3 2006 Sale To Thermax**

8 Jensen negotiated a second transaction in the third quarter of 2006 for which he
9 and Tekulve caused revenue to be improperly recognized. Specifically, on September
10 28, 2006, Jensen obtained an order from Thermax to purchase a water softening
11 system, which he passed on to Tekulve that same day. That order was, however,
12 explicitly contingent upon a Venezuelan entity, PDVSA, purchasing the system from
13 Thermax. (Facts ¶¶ 87 & 89.) Jensen and Tekulve nevertheless caused \$451,000 in
14 revenue to be recognized on the transaction, without persuasive evidence of an
15 arrangement between Basin and Thermax in light of the contingent nature of the deal.
16 (Facts ¶ 92.) Neither Jensen nor Tekulve asked to see the purchase order from
17 PDVSA, which purchase order did not exist. (Facts ¶¶ 88 & 90.)

18 Not only did Thermax never receive a purchase order from PDVSA, but it
19 never made any payments to Basin, and Basin never in fact shipped any units to
20 Thermax pursuant to the order. (Facts ¶ 93.) This meant that three of the four
21 requirements for revenue recognition were not met – there was no persuasive
22 evidence of an arrangement, no delivery occurred, and there was no reasonable
23 assurance of collectability in light of the contingent nature of the agreement.

24 **(3) The 2007 Sham SPE Transactions**

25 In 2007, the Defendants continued their fraudulent course of conduct. With
26 the exception of the first quarter, millions of dollars of revenue was recognized each
27 quarter based upon purported sales to Special Purpose Entities (“SPEs”), assetless
28 companies created specifically for that purpose. Much like the deal with Opus

1 Trust, each of these transactions involved creation of an initial agreement dated “as
2 of” a date at or before the end of the relevant quarter, followed up by much more
3 lengthy complex documentation which included additional and inconsistent terms,
4 meaning that there was no persuasive evidence of an arrangement at the outset, as
5 required by SAB 104 for revenue recognition. Additionally, because the SPEs –
6 VL Capital and WSS – had no assets, and in three of the four transactions, had
7 received no loan from a third party financing entity, there was no reasonable
8 assurance of collectability, also required by GAAP. Also, the transactions required
9 Basin to round-trip its own cash to finance the deals, including by making payments
10 of “standby” fees received from the lessees of the system before any payment
11 toward purchase was due by the SPE, or by making loans to the SPE. (Facts ¶¶
12 123(1)(a) & (b); 123(2)(a) & (b); & 158.e.) As one court has explained, “round-trip
13 trades are sham transactions, and therefore have an inherent tendency to deceive.”
14 *SEC v. Hopper*, 2006 WL 778640, *11 (S.D. Tex. 2006).

15 Millions of dollars of revenue were recognized on these sham deals, which
16 Tekulve was very involved in negotiating – \$3.8 million in Q2 2007 for the first
17 deal with VL Capital; \$2.1 million in Q3 2007 for the first deal with WSS; and
18 \$1,842, 079 in Q4 2007 on second deals with VL Capital (\$489,000 recognized)
19 and WSS (\$1,353,079 recognized). (Facts ¶¶ 117, 132, 145 & 155-157.) Not only
20 were these revenues from the purported SPE transactions a large percentage of
21 quarterly revenues, but in total the \$7.7 million recognized for these purported
22 sales to SPEs represented 42% of Basin’s 2007 annual revenues. (Facts ¶ 161 .)

23 Jensen did not negotiate these deals, as he had negotiated the Opus Trust and
24 Thermax deals. Nevertheless, like Tekulve, Jensen signed and certified false Form
25 10-Qs for Q2 and Q3 2007 that he knew included millions of dollars in revenues
26 for the first transactions with VL Capital and WSS, without investigating these
27 transactions; he also participated in the analyst conference calls, in which Tekulve
28 made misleading statements regarding the transactions. (Facts ¶¶ 132-137, 144-49

1 & 152-153.) Jensen is liable for his silence. *See Barrie v. Intervoice-Brite, Inc.*,
2 397 F.3d 249, 262 (5th Cir. 2005) (citation omitted), *modified on other grounds*,
3 409 F.3d 653, 656 (5th Cir. 2005) (high ranking company official cannot escape
4 liability by keeping silent while false statements are made in an analyst call).

5 Tekulve also lied to the auditors by signing additional false management
6 representation letters and supervising Hansen in preparation of “white papers”
7 requested by the auditors which provided misleading explanations for the Q2
8 transaction with VL Capital and the Q3 transaction with WSS. (Facts ¶¶ 127-129 &
9 141-143.) For example, with regard to VL Capital, Tekulve failed to disclose in the
10 white paper the timing of the respective payments by Basin and VL Capital to each
11 other, which masked the fact that Basin was roundtripping its own cash to finance
12 the transaction, and falsely stated that VL Capital had placed \$500,000 in escrow “as
13 of” June 30, 2007, when no monies had been deposited into escrow. (Facts ¶ 128.)
14 Similarly, with regard to WSS, the white paper claimed that WSS was “backed by
15 National City, a large Chicago bank,” when in fact the relevant financing entity,
16 National City Energy Capital LLC, based in Cincinnati, had not agreed – and never
17 did agree – to finance the transaction, and falsely stated that WSS had made the
18 required \$25,000 deposit into escrow when it had not. (Facts ¶ 141.)

19 The above acts by the Defendants constituted employment of devices,
20 schemes and artifices to defraud, misrepresentations and omissions of material
21 fact, and a course of business which operated as a fraud upon investors and
22 potential investors, as indicated by the sharp drop of 35% in the company’s stock
23 price following the announcement by Basin that it would likely have to restate its
24 2006 and 2007 financial results. (Facts ¶¶ 171-172.) As set forth below, the
25 Defendants acted with scienter in performing these acts and making the material
26 misrepresentations and omissions.

27 c) **Jensen And Tekulve Acted With Scienter**

28 In the Ninth Circuit, scienter may be established by a showing of

recklessness. *SEC v. Todd*, 642 F.3d at 1215. The Ninth Circuit has held that:

Reckless conduct is conduct that consists of a highly unreasonable act, or omission, that is an “extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.”

Id., citing *SEC v. Dain Rauscher, Inc.*, 254 F.3d at 856. Proof of recklessness may be inferred from circumstantial evidence. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91, n.30 (1983); *SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987).⁴

As explained above, both Defendants were aware of certain requirements for revenue to be recognized (Facts ¶¶ 20-21.); both were aware of the timing and amounts of revenue recognized on each transaction up through Q3 2007, and Tekulve was additionally aware of the timing and amounts of revenue recognized on the last two SPE transactions he papered in December 2007. Each Defendant had experience as a high level officer of multiple public companies. (Facts ¶¶ 2 & 8.) Tekulve had additionally been licensed as a CPA, and had been a staff auditor for a major accounting firm early in his career. (Facts ¶ 9.) Each Defendant signed management representation letters to the auditors affirmatively stating that they “are responsible for the fair presentation” of the financial information in conformity with GAAP and that they were not aware of material transactions that had not been properly recorded; reviewed, signed and certified quarterly and annual filings with the Commission; reviewed the earnings press releases; and

⁴ For example, courts have held that significant overstatements of revenue “tend to support the conclusion that the defendants acted with scienter.” *Marksman Partners v. Chantel Pharm. Corp.*, 927 F. Supp. at 1314; *In re Rehm Eagle Fin. Corp.*, 954 F. Supp. 1246, 1255 (N.D. Ill. 1997). Furthermore, drastic overstatements of revenue are particularly suspect when the transaction occurs at a suspicious time, such as the end of a fiscal quarter or year. *Van de Velde v. Coopers & Lybrand*, 899 F. Supp. 731, 735-36 (D. Mass. 1995). Courts have also held that violation of a company’s own revenue recognition policy supports an inference of scienter. *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996); *Van de Velde*, 899 F. Supp. at 735.

1 participated in quarterly earnings conference calls.

2 Some of the additional evidence of Jensen's scienter includes:

3 • Jensen personally negotiated the Opus Trust and Thermax deals.
4 • Jensen was reminded in March 3, 2006, and June 16, 2006, emails from
5 Tekulve that Basin "obviously" needed the revenue from the Opus transaction in
6 Q1, and that BION stock had to issue to Benowitz to prevent reduction of "today's
7 revenues." (Facts ¶¶ 32-33.) After quarter end, Tekulve further reminded Jensen on
8 June 17 that the auditors were looking for the "Benowitz Agreement" by forwarding
9 to Jensen the auditor's June 16 email to prompt Jensen to review the draft agreement
10 he had sent to him on June 16. (Facts ¶¶ 34.)

11 • Jensen not only signed the Opus Agreement, he specifically initialed
12 the liquidated damages clause that was in all capital letters that prevented Basin
13 from seeking collection from Opus Trust of the remaining \$1.35 million owed
14 under the Agreement, which Jensen knew had already been recognized as revenue.
15 (Facts ¶¶ 38-39 & 44.) Jensen's practice was to review contracts before signing
16 them on behalf of Basin. (Facts ¶ 39.)

17 • Although Jensen knew that collectability was relevant to recognizing
18 revenue, he did not investigate whether Opus Trust, a purported offshore entity
19 based in Nevis, had the financial wherewithal to pay the full \$1.5 million owed
20 pursuant to the initial Opus Letter (Facts ¶¶ 21 & 28.)

21 • Even though he angrily rejected a letter setting forth "caveats" or
22 conditions by Thermax, which included that the purchase order from Thermax was
23 conditioned on Thermax receiving a purchase order from its own customer,
24 PDVSA, Jensen nevertheless accepted a document labeled "purchase order" that he
25 received a few days later on September 28, 2006, right before quarter's end on
26 September 30, that included the same conditions. He did so even though he knew
27 that a purchase order "was not a valid order if it was contingent." (Facts ¶¶ 84-87.)

28 • Jensen never asked to see the PDVSA purchase order, even though he

1 understood that the terms and conditions of that order were part of Basin's deal with
2 Thermax, and those terms and conditions were reflected in a purchase order from PDVSA.
3 (Facts ¶ 88.) Indeed, he did not know if the PDVSA order had been issued. (Facts ¶ 88.)

4 • Jensen participated in internal Basin discussions regarding VL
5 Capital, and was aware revenue was recognized on it; in fact, the \$3.8 million was
6 more than half of Basin's Q2 2007 revenues. (Facts ¶¶ 120-122.) Notwithstanding
7 that the revenues from VL Capital were so significant, Jensen signed and certified
8 the Q2 2007 Form 10-Q, which included the false representation that the ten
9 systems were sold as part of a "third party financing arrangement" and sold "to a
10 third party affiliate of a bank," without asking any questions about this footnote to
11 the financial statements, or about the transaction generally. (Facts ¶¶ 133 & 135.)

12 • Jensen similarly signed and certified the Q3 2007 Form 10-Q, which
13 included recognition of \$2.1 million from a purported transaction with WSS, another
14 SPE, knowing that WSS "was one of these financing deals," but not knowing if the
15 disclosures in that Form 10-Q related to the VL Capital transaction for the prior
16 quarter, and not having had any discussions with anyone about whether specific
17 disclosure should be made about the WSS transaction. (Facts ¶ 149.)

18 Some of the additional evidence of Tekulve's scienter includes:

19 • Tekulve edited several drafts of the Opus Agreement which included
20 the liquidated damages clause.

21 • Tekulve took no steps, such as requesting or obtaining financial
22 statements, to determine whether collectability was reasonably likely from Opus Trust
23 and/or Benowitz even though he had no knowledge of their finances. (Facts ¶¶ 29.)

24 • Tekulve knew that "we'll need this one [the Opus Trust transaction] in
25 Q1 (obviously)," and told Jensen so on March 3, 2006. (Facts ¶ 32.)

26 • Tekulve received the Thermax purchase order on September 28, 2006
27 from Jensen, and understood it was subject to the conditions in Addendum A,
28 which included that the terms and conditions were reflected on a purchase order

1 from PDVSA. (Facts ¶¶ 89-90.) He never asked Thermax for a copy of the
2 purchase order. (Facts ¶ 90.)

3 • Before the 10-Q was filed, Tekulve was also told by Sabzali that Thermax
4 had not received a purchase order from PDVSA; Tekulve never did see a purchase
5 order from PDVSA. (Facts ¶¶ 91 & 93.) Nevertheless, on March 6, 2007, Tekulve
6 falsely represented in a memo to the auditors entitled “Analysis of Bad Debt Reserve
7 as of 12/31/06” submitted on or about March 6, 2007, right before the 2006 Form 10-K
8 was filed, that “Management expects full collection of the entire contract amount.
9 Accordingly, management does not believe that any specific bad debt reserve is
10 necessary as of 12/31/06.” (Facts ¶ 104.)

11 • Tekulve knew that VL Capital and WSS were newly formed entities
12 with no assets. (Facts ¶¶ 119 & 138.)

13 • Tekulve knew that Basin did not have definitive agreements with VL
14 Capital on June 30, 2007, or with WSS on September 30, 2007, as he subsequently
15 signed Agreements which differed materially in their terms from the end of quarter
16 Commitment Letters. (Facts ¶¶ 118 & 140.a.)

17 • Tekulve understood that Basin was “obviously” financing the majority
18 of the VL Capital transaction, including because “a half million dollars in cash []
19 was put into the transaction by Basin.” (Facts ¶ 124.)

20 • Tekulve approved Hansen’s “white papers” prepared at the request of
21 the auditors to explain the VL and WSS transactions, even though those white
22 papers were materially misleading. (Facts ¶ 128 & 141.)

23 • Tekulve knew that collectability from WSS was not probable, as it was
24 dependent on a loan from a third party which was not funded, and as WSS had not
25 paid the initial down payment. (Facts ¶ 140.b. & c.)

26 • Tekulve initiated documentation for two new purported sales to SPEs,
27 one to VL Capital and one to WSS, on December 26, 2007, because, as he noted in
28 his calendar on December 28, “we need the revenues.” (Facts ¶ 154.) Although he

1 never even approached Basin's customers to obtain their required consents to the
2 assignments of the water services agreements to the SPEs, Tekulve caused
3 \$1,842,079 in revenue to be recognized on these transactions. (Facts ¶ 155-158.)

4 The undisputed evidence is thus overwhelming: both Jensen and Tekulve
5 acted knowingly or recklessly.

6 **2. The Defendants Are Liable For Basin's Violations Of The**
7 **Issuer Reporting Provisions**

8 Issuers of securities are required to file annual Forms 10-K and quarterly
9 Forms 10-Q with the Commission. Section 13(a) of the Exchange Act, 15 U.S.C. §
10 78m(a), and Rules 13a-1 and 13a-13 thereunder, 17 C.F.R. §§ 240.13a-1 & 240.13a-
11 13. These reports must be prepared in conformity with GAAP.⁵ Because Basin's
12 Forms 10-Q and 10-K were misleading and not prepared in conformity with GAAP,
13 Basin violated the reporting requirements.⁶

14 The Defendants are liable for Basin's violations of the company reporting
15 provisions of the Exchange Act as either control persons or aiders and abettors.
16 Because the reporting provisions do not require proof of scienter by the company,
17 *Ponce v. SEC*, 345 F.3d 722, 737 n.10 (9th Cir. 2003), and the Defendants meet the
18 definition of control person, the fact that the filings were materially false is
19 sufficient to hold the Defendants liable as control persons. The evidence also
20 establishes the following elements necessary to establish aiding and abetting: (1)
21 Basin violated these provisions; (2) the Defendants had knowledge of the primary
22 violation and of their role in furthering it; and (3) the Defendants provided
23 substantial assistance in the primary violation. *See SEC v. Todd*, 642 F. 3d at
24

25 ⁵ *Ponce v. SEC*, 345 F.3d at 735; *see also SEC v. Chester Holdings, Ltd.*, 41
26 F. Supp. 2d 505, 526 (D.N.J. 1999), *citing* Rule 12b-20, 17 C.F.R. § 240.12b-20
(statements in the reports must not be misleading and financial reports are
presumed to be misleading if not filed in accordance with GAAP).

27 ⁶ The acts of Jensen, Tekulve and other Basin employees may be imputed to
28 Basin. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir.
1972) (imputing individual's scienter to entities he controlled).

1 1225, *citing Ponce v. SEC*, 345 F.3d at 737.

2 **3. The Defendants Falsified Basin's Books And Records**

3 The Defendants also directly violated Section 13(b)(5) of the Exchange Act,
4 which states that: "No person shall . . . knowingly falsify any book, record, or account.
5 . . ." Their conduct further violated Exchange Act Rule 13b2-1, 17 C.F.R. § 240.13b2-
6 1, which prohibits the direct or indirect falsification of company books and records.

7 Section 3(a)(37) of the Exchange Act, 15 U.S.C. § 78c(a)(37), defines "records"
8 as follows: including "accounts, correspondence, memorandums, tapes, discs, papers,
9 books, and other documents or transcribed information of any type. . . ." Financial
10 statements themselves constitute books and records within the meaning of Section
11 13(b)(2)(A) (and thus Rule 13b2-1) and Section 13(b)(5). *See United States v. Crop*
12 *Growers Corp.*, 954 F. Supp. 335, 357 (D.D.C. 1997).

13 There is no requirement that the Defendants act with scienter to violate Rule
14 13b2-1. *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997).
15 However, the Defendants' conduct in falsifying the books and records in fact was
16 knowing; it therefore also violated Section 13(b)(5) of the Exchange Act.

17 **4. Tekulve Lied To The Auditors**

18 Officers of issuers are prohibited from making or causing to be made materially
19 false or misleading statements or omissions of material fact to accountants in
20 connection with audits, quarterly reviews or examinations of company financial
21 statements or the preparation and filing of required Commission reports. Commission
22 Rule 13b2-2, 17 C.F.R. § 240.13b2-2. The level of scienter required to establish a
23 violation of Rule 13b2-2 is the same as for establishing violations of Rule 10b-5. *SEC*
24 *v. Todd*, 642 F.3d at 1220. Because Tekulve acted with scienter with respect to the
25 10b-5 violations, he therefore knew that the management representation letters he was
26 signing were false. *Id.* Likewise, he knew that the 2006 "Analysis of Bad Debt"
27 memo where he falsely represented that management expected to collect the full
28 amount owed by Thermax, and the white papers to the auditors misrepresenting the

1 first VL Capital and WSS transactions were false. His presentation of these
2 memoranda to the auditors thus also violated Rule 13b2-2.

3 **5. The Defendants Falsely Certified Commission Filings**

4 Exchange Act Rule 13a-14, 17 C.F.R. § 240.13a-14, requires that a
5 company's principal executive and principal financial officers certify that the Form
6 10-Q or Form 10-K being signed fully complies with the requirements of the
7 Exchange Act and fairly presents, in all material respects, the financial condition
8 and results of operations of the company. As described above, the Defendants'
9 certifications of the Forms 10-Q and 10-K were false, as these filings contained
10 material misrepresentations regarding Basin's financial condition. *See SEC v.*
11 *Indigenous Global Development Corp.*, 2008 Fed. Sec. L. Rep. (CCH) ¶ 94,768,
12 2008 U.S. Dist. LEXIS 50434 * 44 (N.D. Cal. June 30, 2008) (granting
13 Commission summary judgment as to Rule 13a-14 violations).

14 **6. Jensen Engaged In Insider Trading**

15 Under the "traditional" or "classical" theory of insider trading liability, Section
16 10(b) and Rule 10b-5 are violated when a corporate insider trades in the securities of
17 his corporation on the basis of material nonpublic information. *United States v.*
18 *O'Hagan*, 521 U.S. 642, 651-52 (1997). A purchase or sale of securities is made "on
19 the basis of" material nonpublic information "if the person making the purchase or
20 sale was aware of the material nonpublic information when the person made the
21 purchase or sale." Exchange Act Rule 10b5-1(b), 17 C.F.R. § 240.10b5-1(b).

22 Here, Jensen was not only aware of the material nonpublic information that
23 Basin's financial condition was being materially misrepresented to the public – he
24 created and disseminated false information regarding Basin's financial condition.
25 He then sold large amounts of Basin stock, profiting by millions of dollars.

26 Although Jensen will undoubtedly argue that the shares he sold were sold
27 pursuant to a 10b5-1 plan providing for automatic sales of his stock when the price
28 reached certain trigger points, he cannot meet his burden to establish this

1 affirmative defense because for the defense to apply, he must demonstrate that
2 before becoming aware of the information, he adopted his written 10b5-1 plan.
3 Rule 10b5-1(c)(1)(i)(A). However, Jensen cannot make this showing because he
4 entered into his plan December 13, 2006, after the false Q3 2006 10-Q which he
5 certified was filed with the Commission on November 14, 2006. (Facts ¶ 168.)⁷
6 Jensen understood that he was only permitted to enter into such a trading plan
7 when he was not in possession of material nonpublic information. (Facts ¶ 169.)
8 That 10-Q included the revenue fraudulently recognized for the Opus Trust and
9 Thermax transactions Jensen had negotiated. Rule 10b5-1(c)(1)(ii). *See SEC v.*
10 *Mozilo*, 2010 U.S. Dist. LEXIS 98203 * 63-67 (C.D. Cal. September 16, 2010).

11 **B. The Commission Is Entitled To The Relief It Seeks**

12 **1. Permanent Injunctions Are Appropriate**

13 To obtain an injunction, the Commission must establish that there is a
14 reasonable likelihood of future violations. *See SEC v. Murphy*, 626 F.2d 633, 655
15 (9th Cir. 1980). Whether a likelihood of future violations exists depends upon the
16 totality of the circumstances. *Id.* The existence of past violations may give rise to
17 an inference that there will be future violations. *See id.* Courts also consider
18 factors such as the degree of scienter involved, the isolated or recurrent nature of
19 the violative conduct, the defendant's recognition of the wrongful nature of the
20 conduct, the likelihood that, because of the defendant's occupation, future
21 violations may occur, and the sincerity of defendant's assurances (if any) against
22 future violations. *SEC v. Murphy*, 626 F.2d at 655. Because all of the above
23 factors are present, permanent injunctions are appropriate.

24 **2. Disgorgement Should Be Ordered**

25 Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and
26

27 ⁷ The plan was entered into one day after Jensen made his sole trade in 2006,
28 whereby he profited by \$320,000. (*See* Facts ¶ 167 (chart).) For this threshold
reason, Jensen cannot use the existence of the plan as a defense for his 2006 sale.

1 to deter others from violating securities laws by making violations unprofitable; a
2 district court has broad equity powers to order the disgorgement of ill-gotten gains
3 obtained through violation of the securities laws. *SEC v. Platforms Wireless*, 617
4 F.3d 1072, 1096 (9th Cir. 2010); *SEC v. First Pacific Bancorp*, 142 F.3d 1186,
5 1191 (9th Cir. 1998). “The amount of disgorgement should include all gains
6 flowing from the illegal activities.” *See SEC v. Platforms Wireless*, 617 F.3d at
7 1096, *quoting SEC v. JT Wallenbrock*, 440 F.3d 1109, 1114 (9th Cir. 2006).

8 The Commission need only present evidence of a “reasonable
9 approximation” of the defendant’s ill-gotten gains. *See SEC v. Platforms Wireless*,
10 617 F.3d at 1096; *SEC v. JT Wallenbrock*, 440 F.3d at 1113-14. The burden then
11 shifts to the defendant to “demonstrate that the disgorgement figure was not a
12 reasonable approximation.” *SEC v. Platforms Wireless*, 617 F.3d at 1096, *quoting*
13 *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989).

14 In this case, the Commission seeks disgorgement of salaries, bonuses and
15 stock compensation, and with respect to Jensen, his insider trading profits for 2006
16 and 2007 and a reasonable approximation of his tax deductions. These amounts
17 total \$3,771,214 for Jensen and \$721,424 for Tekulve. (Tercero Declaration ¶ 93.)

18 Additionally, disgorgement normally includes prejudgment interest to insure
19 that wrongdoers do not profit from their illegal conduct, which may be calculated
20 based on the rate provided in 26 U.S.C. § 6621 for tax underpayments. *SEC v.*
21 *Platforms Wireless*, 617 F.3d at 1099. Jensen and Tekulve thus owe \$856,033.59
22 and \$152,078.52 respectively in prejudgment interest. (Tercero Declaration ¶ 95.)

23 **3. Reimbursement Should Be Ordered**

24 SOX Section 304, 15 U.S.C. § 7243 provides that:

25 If an issuer is required to prepare an accounting restatement due to the
26 material noncompliance of the issuer, as a result of misconduct, with any
27 financial reporting requirement under the securities laws, the chief executive
28 officer and chief financial officer of the issuer shall reimburse the issuer for –

(1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever occurs first) of the financial document embodying such financial reporting requirement; and

(2) any profits realized from the sale of securities of the issuer during that 12-month period.

Section 304 does not require personal misconduct by the CEO or CFO; it merely requires misconduct by the issuer, Basin. *See SEC v. Jenkins*, 2010 U.S. Dist. LEXIS 57023 * 6-8 (D. Az. 2010). As explained, Basin's financial statements were repeatedly and materially misstated, as a result of violations of very basic GAAP provisions governing revenue recognition. This resulted in restatement of Basin's 2006 and 2007 financial statements. (Facts ¶ 173.) The Defendants should accordingly be required to disgorge as reimbursement their equity-based compensation and bonuses; Jensen should further be ordered to reimburse his trading profits, including from 2008. Jensen should reimburse \$9,533,617; Tekulve should reimburse \$396,280. (Tercero Declaration ¶ 93.)

4. Remedies Act Civil Penalties Should Be Imposed

If the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and "such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons" a third tier penalty may be imposed. *See* Section 21(d)(3)(B)(iii) of the Exchange Act, 15 U.S.C. § 78u(d)(3)(B)(iii). Plaintiff Commission recommends that two \$130,000 maximum third tier civil money penalties totaling \$260,000 be imposed against each Defendant representing two violations.⁸ The assessment of a penalty in

⁸ The statutory amounts found in the Exchange Act have been amended by the Debt Collection Improvement Act of 1996, Pub L. No. 104-134, Section 31001(s), April 26, 1996. The amendments authorize the Commission to adjust the civil penalties for inflation by rulemaking. The Commission has done so. *See* 17

1 this amount is appropriate because these Defendants not only violated the antifraud
2 provisions, but their conduct directly or indirectly created a risk of substantial losses
3 to other persons, as evidenced by the dramatic 35% drop in share price following the
4 announcement that Basin might have to restate its revenues. (Facts ¶ 171.)

5 The proposed penalties reflect, in the case of Jensen, his involvement in the Benowitz
6 and Thermax transactions. In the case of Tekulve, a double penalty is appropriate in light
7 of his continued involvement in the fraudulent scheme for a period of two years.

8 The factors used to determine the appropriateness of an injunction are helpful
9 when assessing penalties. *SEC v. Abacus International Holding Corp.*, [2001 Transfer
10 Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,542, 2001 U.S. Dist. LEXIS 12635, 2001 WL
11 940913, *5 (N.D. Cal. August 16, 2001). Evaluation of these factors indicates that
12 imposition of the requested \$260,000 penalties against each defendant is appropriate.

13 **5. Jensen Should Be Ordered To Pay A Triple ITSA Penalty**

14 In addition to Remedies Act penalties for his financial fraud, Jensen should
15 be ordered to pay penalties under the Insider Trading Sanctions Act (“ITSA”).
16 Section 21A(a)(1)(A) of the Exchange Act, 15 U.S.C. § 78u-1(a)(1)(A), provides
17 that the Court has jurisdiction to impose a civil penalty of up to “three times the
18 profit gained . . . as a result of such unlawful . . . sale.” 17 U.S.C. § 78u-
19 1(a)(1)(A)(2). Here, Jensen created a false picture of the company’s finances,
20 negotiating the Opus and Thermax deals for which it was clear little, if any,
21 revenue would flow to Basin; he nevertheless caused \$2 million in revenue to be
22 recognized on these transactions, disseminated that false revenue information to
23 the public, and benefited significantly from selling Basin shares while the true
24 financial information remained nonpublic. The Commission seeks a triple ITSA

25
26 C.F.R. §§ 201.1003 & 201.1004 & Tables III & IV (2011). For conduct occurring
27 subsequent to February 14, 2005, but prior to March 3, 2009, the third tier imposes
28 maximum limits for each violation of the greater of \$130,000 for natural persons
respectively, or the “gross amount of pecuniary gain” to the defendant, rather than
the \$100,000 set forth in the statute. (*Id.*)

1 penalty on Jensen's trades in 2006 and 2007, made before he signed and certified
2 his final Basin filing with the Commission, the Q2 Form 10-Q on November 14,
3 2007, and before he left his position as Basin CEO on February 19, 2008. (*See*
4 Facts ¶¶ 1 & 167(chart).) Jensen's profits gained in 2006 and 2007 totaled
5 \$2,845,034. A triple ITSA penalty would total \$8,535,102.

6 **6. Permanent Officer And Director Bars Are Appropriate**

7 The Court is authorized to prohibit any person who violates Section 10(b) from
8 acting as an officer or director of any public company if the person's conduct
9 demonstrates unfitness to serve as an officer or director. *See* Section 21(d)(2) of the
10 Exchange Act, 15 U.S.C. § 78u(d)(2). Previously, the statute required proof of
11 "substantial unfitness," in 2002 Congress lowered the Commission's burden, merely
12 requiring it to establish the defendant's "unfitness." *See SEC v. Indigenous Global*
13 *Development Corp.*, 2008 U.S. Dist. LEXIS 50434 at ** 53-54. Under the older,
14 more stringent standard, the Ninth Circuit held that, in determining whether to order
15 such a bar, a court may consider: (1) the egregiousness of the underlying violation; (2)
16 the defendant's "repeat offender" status; (3) the defendant's role or position when he
17 engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's
18 economic stake in the violation; and (6) the likelihood that misconduct will recur.
19 *SEC v. First Pacific Bancorp.*, 142 F.3d at 1193 (upholding permanent bar). Each of
20 these factors favors imposition of a permanent bar against both defendants.

21 **III. CONCLUSION**

22 For the reasons stated, the Commission's motion should be granted.

23
24 Dated: July 23, 2012

Respectfully submitted,

25
26 /s/Karen Matteson
27 Karen Matteson
28 Attorney for Plaintiff
Securities and Exchange Commission

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

[X] U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648

Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On July 23, 2012, I caused to be served the document entitled **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT THOMAS C. TEKULVE, JR., AND FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT PETER L. JENSEN** on all the parties to this action addressed as stated on the attached service list:

[] **OFFICE MAIL:** By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

[] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service. Each such envelope was deposited with the U.S. Postal Service at Los Angeles, California, with first class postage thereon fully prepaid.

[] **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Los Angeles, California, with Express Mail postage paid.

[] **HAND DELIVERY:** I caused to be hand delivered each such document to the office of the addressee as stated on the attached service list.

[] **UNITED PARCEL SERVICE:** By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

[] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

[X] **E-FILING:** By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

[] **FAX:** By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 23, 2012

/s/ Karen Matteson
Karen Matteson

SEC v. Peter L. Jensen, et al.
United States District Court – Central District of California
Case No. CV 11-05316 R (AGRx)
(LA-3478)

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